CHAI LAI FOOK & ORS

v.

SENTUL RAYA SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
TEE AH SING J
[ORIGINATING SUMMONS NO: S5-24-225-2003]
15 JULY 2004

CONTRACT: *Frustration - Sale and purchase agreement - Delay in handing over vacant possession of condominium units - Delay blamed on economic downturn beyond developer's control - Application by developer to Controller of Housing for extension of time to deliver vacant possession rejected - Whether High Court ought to allow developer's defence of frustration - Whether such defence would allow developer to escape liability for late delivery - Whether such defence would have effect of overriding decision of Controller of Housing - Contracts Acts 1950 s. 57(2)*

LAND LAW: *Housing developers - Delay in completion - Delay blamed on economic downturn beyond developer's control - Action by purchasers for damages for late delivery - Whether developer's defence of frustration could succeed*

By sale and purchase agreements ('the agreements') executed between the plaintiffs and the defendant, the plaintiffs agreed to purchase condominium units ('the units') from the defendant. The defendant was at all material times a joint-venture vehicle of Keretapi Tanah Melayu Bhd ('KTMB') and YTL Land & Development Bhd ('YTL Land'). The agreements were in accordance with Schedule 'H' of the Housing Developers (Control and Licensing) Regulations 1989 ('the Regulations') made under the Housing Developers (Control and Licensing) Act 1966. Pursuant to the agreements, the defendant agreed to hand over vacant possession of the units and to complete the common facilities within 36 months from the date of the agreements. Time was deemed to be of the essence by an express term in the agreements. It was also an express term that if the defendant failed to hand over vacant possession of the units within 36 months, the defendant would pay the plaintiffs liquidated damages at the agreed rate calculated on a daily basis. As it transpired, the defendant failed to deliver vacant possession of the units or to complete the common

facilities within the 36-month period. The plaintiffs thus commenced an action against the defendant for several declarations and also to recover liquidated damages. For the defendant it was submitted that the delay in completing the units was due to the economic downturn of the country beyond the defendant's control and which had affected the financial position of YTL Land, and in turn that of the defendant. It was also submitted that YTL Land had to undergo a scheme of arrangement pursuant to s. 176 of the Companies Act 1965. It was submitted that the liquidated damages claimed by the plaintiffs was not reasonable compensation. The defendant further submitted that it had applied to obtain a certificate under reg. 11(3) of the Regulations to extend the delivery date of the condominium units but such application was refused by the Controller of Housing.

Held (allowing the plaintiffs' claim with costs):

[1] All the main arguments and contentions in the instant case were raised and settled in the case of *Hariram Jayaram & Ors v. Sentul Raya Sdn Bhd* [2002] 4 CLJ 796. The court would thus apply and adopt the decision in *Hariram*'s case in the instant case. (p 79 d)

[2] The court could not accept the defence of frustration under s. 57(2) of the Contracts Acts 1950 and allow the defendant to escape liability for the delay in delivering vacant possession of the units as the Controller of Housing had rejected the defendant's application for an extension of time to deliver vacant possession. To allow the defence of frustration to succeed would amount to the High Court overriding the decision of the Controller of Housing in refusing to grant the certificate for extension of time to deliver vacant possession of the units. (pp 80 h & 81 a)

Case(s) referred to:
Hariram Jayaram & Ors v. Sentul Raya Sdn Bhd [2002] 4 CLJ 796 HC ***(foll)***

Legislation referred to:
Companies Act 1965, s. 176
Contracts Acts 1950, s. 57(2)
Housing Developers (Control and Licensing) Regulations 1989, reg. 11(3)

For the plaintiffs - Sree Harry; M/s Sri Ram & Co
For the defendant - Sylvia Cotter; M/s Logan Sabapathy & Co

Reported by Andrew Christopher Simon

JUDGMENT

Tee Ah Sing J:

This is an application by the plaintiffs by originating summons (encl. 1) for the following orders:

(a) a declaration that the purported termination by the defendant of the sale and purchase agreements entered between the plaintiffs and the defendant was and is invalid and void;

(b) that the defendant pay the plaintiffs liquidated damages to be calculated from day to day at the rate often per centum (10%) per annum of the purchase price arising from the defendant's failure to hand over vacant possession of the condominium units to the plaintiffs within the time prescribed in the respective sale and purchase agreements;

(c) that the defendant pay the plaintiffs liquidated damages to be calculated from day to day at the rate often per centum (10%) per annum of the last twenty per centum (20%) of the purchase price arising from the defendant's failure to complete the common facilities within the time prescribed in the respective sale and purchase agreements;

(d) a declaration that the plaintiffs are entitled to set-off the remaining purchase price to be paid to the defendant against such liquidated damages found due from the defendant to the plaintiffs under (b) and (c) above;

(e) an order for payment by the defendant to the plaintiffs of all sums found to be due from the defendant to the plaintiffs after having set-off the remaining purchase price to be paid to the defendant against the liquidated damages found due under (b) and (c) above;

(f) that the defendant pay the plaintiffs liquidated damages to be calculated from day to day at the rate often per centum (10%) per annum of the purchase price from the date of this order to the date of actual delivery of vacant possession of the condominium units to the plaintiffs;

(g) that the defendant pay the plaintiffs liquidated damages to be calculated from day to day at the rate often per centum (10%) per annum of the last twenty per centum (20%) of the purchase price from the date of this order to the date of actual completion of the common facilities;

(h) an order that the defendant delivers vacant possession and complete the common facilities of the condominium units to the plaintiffs;

(i) a declaration that the defendant is not entitled to claim interest on late payments as of 31 January 1998 being the date where all works on the Sang Suria Condominium Projects came to a complete, standstill;

A defendant's affidavit (No 2) was affirmed by Hamidah binti Maktar on 22 August 2003 (encl. 6) in reply to encl. 5.

An afidavit plaintif-plaintif (No 3) was affirmed by Ong on 3 October 2003 (encl. 7).

The facts of the case are as follows:

By the sale and purchase agreements made between the plaintiffs and the defendant, the plaintiffs agreed to purchase condominium units from the defendant - the developer. The sale and purchase agreements were in accordance with Schedule 'H' to the Housing Developers (Control and Licensing) Regulations 1989 ('the Housing Regulations') which were in turn made under the Housing Developers (Control and Licensing) Act 1966 ('the Housing Act').

By cls. 22(1) and 24(1) of the sale and purchase agreements, the defendant agreed to hand over vacant possession of the condominium units to be erected by the defendant to the plaintiffs and the defendant too agreed to complete the common facilities within 36 calendar months from the date of the sale and purchase agreements. Clause 7 of the sale and purchase agreements stipulate, as an express term, that time should be deemed to be the essence of the contract. By cl. 22(2) of the sale and purchase agreements, it was an express term that if the defendant failed to hand over vacant possession of the condominium units within the 36 calendar months, the defendant shall pay immediately to the plaintiffs liquidated damages to be calculated from day to day at the rate of 10% pa of the purchase price. By cl. 24(2) of the sale and purchase agreements, it was an express term that if the defendant failed to complete the common facilities within the 36 months, the defendant shall pay immediately to the plaintiffs liquidated damages to be calculated from day to day at the rate of 10% pa of the last 20% of the purchase price. Sadly, 36 months have past and gone and the defendant has yet to hand over vacant

possession of the condominium units to the plaintiffs and to complete the common facilities. For these reasons, and relying on cls. 22 and 24 of the sale and purchase agreements, the plaintiffs said that the defendant was liable to pay the plaintiffs a total sum of RM956,372.68 as liquidated damages calculated up to 13 February 2002 and continuing.

Now, pursuant to cl. 22 of the sale and purchase agreements, the particulars of the liquidated damages were itemized as follows:

	Lot No.	Date of Sale & Purchase Agreement	Purchase Price (RM)	Delivery Date for Vacant Possession	LAD As at 13.2.02 (RM)
1st Plaintiff	C1A/09-5	17.4.97	229,339.00	17.4.00	41,972.18
2nd and 3rd Plaintiffs	C1A/12-5	23.5.97	241,927.00	23.5.500	41,889.83
4th and 5th Plaintiffs	C1A/06/1	7.12.95	240,120.00	7.12.98	76,641.04
6th and 7th Plaintiffs	C1B/15/3	27.7.96	295,124.00	27.7.99	75,357.69
8th and 9th Plaintiffs	C1B/02/1	28.4.97	212,877.90	28.4.2000	38,259.70
10th and 11th Plaintiffs	C1A/18/6	24.9.95	295,928.00	24.9.98	100,372.29
12th Plaintiff	C1B/09/04	2.10.95	271,091.00	2.10.98	110,738.82
13th and 14th Plaintiffs	C1A/09/4	3.6.96	258,182.00	3.6.99	69.815.24
15th Plaintiff	C1A/19/6	11.11.96	380,572.00	11.11.99	86,123.96
16th and l7th Plaintiffs	C1A/22/3	11.11.96	394,768.00	11.11.99	89,336.54
18th and 19th Plaintiffs	C1A/08-6	8.7.96	254,848.00	8.7.99	66,469.94
Total Amount Due and Owing to the Plaintiffs under Clause 22					**796,977.23**

Whereas, pursuant to cl. 24 of the sale and purchase agreements, the particulars of the liquidated damges were listed as follows:

Lot No.	Date of Purchase Sale & Purchase Agreement	Price (RM)	Delivery Date for Vacant Possession	LAD As at 13.2.02 (RM)
1st Plaintiff	C1A/09-5	17.4.97	45,867.80	17.4.00	8,394.44
2nd and 3rd Plaintiffs	C1A/12-5	23.5.97	48,385.40	23.5.00	8,377.96
4th and 5th Plaintiffs	C1A/06/1	7.12.95	48,024.00	7.12.98	15,328.21
6th and 7th Plaintiffs	C1B/15/3	27.7.96	59,024.80	27.7.99	15,071.54
8th and 9th Plaintiffs	C1B/02/1	28.4.97	42,575.58	28.4.00	7,651.94
l0th and 11th Plaintiffs	CIA/18/6	24.9.95	59,185.60	24.9.98	20,074.46
12th Plaintiff	C1B/09/04	2.10.95	54,218.80	2.10.98	22,147.76
13th and l4th Plaintiffs	C1A/09/4	3.6.96	51,636.40	3.6.99	13,963.05
15th Plaintiff	C1A/19/6	11.11.96	78,953.60	11.11.99	17,224.80
16th and 17th Plaintiffs	C1A/22/3	11.11.96	78,953.60	11.11.99	17,867.30
18th and 19th Plaintiffs	C1A/08-6	8.7.96	50,969.60	8.7.99	13,293.99
Total Amount Due and Owing to the Plaintiffs under Clause 24					159,395.45

Lee in para. 5 of encl. 4 has averred that the 10th and 11th plaintiffs have not settled the last 35% of the progressive billing for the sum of RM103,574.80 and interest of RM6,721.21 for late payment. Lee also averred that the 13th and 14th plaintiffs have not settled the last 35% of the progressive billing for the sum of RM90,363.70 and interest for late payment of RM6,601.96. As for the 16th and 17th plaintiffs they have not settled the last 20% of the progressive billing for the sum of RM78,953.60 and late interest payment of RM4,034.22. As for the 18th and 19th plaintiffs they have not settled the last 35% of the progressive billing for the sum of RM89,196.80 and late interest payment of RM5.818.13.

Ong in para. 6 of encl. 5 has averred that the 10th, 11th, 13th, 14th, 16th to 19th plaintiffs do not owe the defendant the sums as alleged by the defendant at para. 5 of encl. 4. This is because they have elected to exercise their right to set-off the progress payments against liquidated damages payable by the defendant under cls. 22(2) and 24(2) of their sale and purchase agreement.

The defendant's record shows that the 1st, 2nd, 3rd, 6th, 7th, 10th, 11th, 15th, 16th, 17th, 18th and 19th plaintiffs had previously given notice of their intentions to claim liquidated damages against the defendant for late delivery, the said plaintiffs' notices were given well after the expiry of the respective times limited for delivery of vacant possession. Save for these said plaintiffs, the defendant's records do not appear to have any notice from the other plaintiffs of their intentions to claim such liquidated damages.

Lee in encl. 4 has also averred that the defendant is, and was at all material times, a joint venture vehicle of Keretapi Tanah Melayu Bhd ('KTMB') and YTL Land & Development Bhd (formerly known as Taiping Consolidated Bhd) ('YTL Land'). That YTL Land is a public listed company set up for the purpose of developing a development known as Sentul Raya Development which includes the portion of the development known as the Sang Suria Condominiums wherein various sale and purchase agreements were entered into by the plaintiffs. It was averred by Lee that the delay in the completion of the plaintiffs' respective units were due to the economic downturn of the country in 1997 to 1998 beyond the defendant's control which seriously affected the financial position of YTL Land and in turn that of the defendant with the result that, as each of the plaintiffs were aware, all works on the Sentul Raya Development came to a stop in January 1998. Lee further averred that in fact, many of the purchasers of the defendant's developments who had obtained financing to effect their purchases also had their financing facilities frozen thereby affecting their ability to settle their progress billings. As a result thereto, it was averred that YTL Land has had to undertake a scheme of arrangement pursuant to s. 176 of the Companies Act 1965 which scheme was also sanctioned by the Kuala Lumpur High Court in 2001 as seen in Suit No. DI-26-2 of 2001. It was averred that upon the finalization of the restructuring exercises that it was possible for the defendant to continue with the development of the Sentul Raya Development as a whole. The restructuring exercises included:

(a) a restructuring of the underlying project agreements with KTMB in respect of Sentul Raya Development which was subject to the approvals of the relevant authorities, namely, the Kuala Lumpur Stock Exchange, the Securities Commission, the Economic Planning Unit of the Prime Minister's Department and the Foreign Investment Committee; and

(b) an injection of fresh available funds.

Lee averred that the subject development which included the plaintiffs' units were expected to be completed sometime in September 2002.

Lee averred that if it were not for the YTL restructuring exercise, the defendant would not have been able to resume works on the Sentul Raya Development and complete the construction of the Sang Suria Condominiums, much less delivery vacant possession of the same sometime in 2002.

Lee also averred that with reference to the quantum of the liquidated damages claimed by the plaintiffs which amounts to between 20% to 40% of the purchase price of each unit and that the liquidated damages claimed do not amount to a reasonable compensation to the plaintiffs of the loss purportedly suffered by them as a resuslt of the present delay. Further with the re-launch of the Sentul Raya Development as a whole, the property prices of that area, including those properties bought by the plaintiffs, can only improve.

Ong in para. 10 of encl. 5 has averred that the defendant had applied to obtain a certificate under reg. 11(3) of the Housing Regulations to extend the delivery date of the condominium units but was refused by the Controller of Housing *vide* letter dated 29 November 2002 (exh. "A12").

The learned counsel for the plaintiffs has put in the plaintiffs' submissions (No. 1) dated 6 October 2003.

The learned counsel for the defendant has put in the defendant's reply submissions dated 19 November 2003.

The learned counsel for the plaintiffs has put in the plaintiffs' submissions (No. 2) dated 13 January 2004.

The learned counsel for the defendant has put in the defendant's further reply dated 17 February 2004.

And finally the learned counsel for the plaintiffs has put in the plaintiffs' submissions" (No. 3) dated 26 February 2004.

I shall now deal with the matter before me. I have perused all the written submissions of both the plaintiffs and the defendant. And I find that all the main arguments and contentions in our case has also been raised in the case of *Hariram Jayaram & Ors v. Sentul Raya Sdn Bhd* [2002] 4 CLJ 796 before his Lordship Abdul Malik Ishak J.

In the case of *Hariram Jayaram v. Sentul Raya Sdn Bhd* [2002] 4 CLJ 796 ("*Hariram*'s case") his Lordship Abdul Malik Ishak J (at pp. 804 to 811) said as follows:

> In opposing the plaintiffs' application in encl (1), the defendant raised two legal issues for the determination of this court, namely:
>
> (i) whether s. 56(3) of the Contracts Act 1950 would operate to exclude a claim for liquidated ascertained damages by reason of the failure on the part of the plaintiffs to give the relevant notices to the defendant of their intentions to claim liquidated ascertained damages at the time of acceptance of later performance?
>
> (ii) whether the terms of the sale and purchase agreements which were in accordance with Schedule 'H' to the Housing Regulations which were made under the Housing Act can be said to operate to entitle the plaintiffs to liquidated ascertained damages in any event despite the provisions of s. 56(3) of the Contracts Act of 1950 as to the requirement of the relevant notices?
>
> In examining these two legal issues, it would be ideal to reproduce verbatims 56 of the Contracts Act 1950 and that section enacts as follows:
>
> Effect of failure to perform at fixed time, in contract in which time is essential
>
> (1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.
>
> Effect of failure when time is not essential
>
> (2) If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do the thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by the failure.
>
> Effect of acceptance of performance at time other than that agreed upon
>
> (3) If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of the promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of the acceptance, he gives notice to the promisor of his intention to do so.

Anant Singh J speaking for the Indian Supreme Court in the case of *Hindustan Construction Company v. The State of Bihar* (1963) AIR Patna 254 particularly at pp. 258-259 of the report, had this to say in regard to the requirement of extending a notice in the context of a voidable contract where time was the essence of the contract:

> The law on time being of the essence of the contract is to be found in s. 55 of the Indian Contracts Act, which is as follows:
>
> > When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.
>
> It will be noticed, even such a contract, when time is of the essence of the contract, is only voidable at the option of the promisee and does not come to an end by itself after the expiry of the period. The promisee has to terminate it by proper notice as provided in s. 55 of the Act, otherwise the option to avoid the contract will be deemed to have been waived and the contract subsisting.

It can readily be appreciated that the equivalent of s. 55 of the Indian Contracts Act is our s. 56 of the Contracts Act 1950. Now, in the context of the present case, time was provided under the sale and purchase agreements between the parties to be of the essence and this can be seen in cl 7 of the sale and purchase agreements which states as follows:

> Time shall be the essence of the contract in relation to all provisions of this agreement.

That being the case, Mr. Michael KT Chow, the learned counsel for the defendant, submitted that at the expiry of the period of performance (which would be on the original completion date) then the plaintiffs had, under s. 56(1) of the Contracts Act 1950, the options to either terminate the sale and purchase agreements or to continue with it. Mr. Michael KT Chow submitted that if the plaintiff had chosen to terminate the sale and purchase agreements, then the plaintiffs ought to give to the defendant proper and express notices of termination. Mr. Michael KT Chow heavily relied on the case of *Hindustan Construction Company v. The State of Bihar* to drive home the message that the sale and purchase agreements did not automatically come to an end by itself just by reason of the expiry of the original completion dates. So, it was pointed out that unless the plaintiffs had given the defendant the proper and express notices of termination as required, then the defendant was entitled to assume that the plaintiffs had waived their options to avoid the sale and purchase agreements and that agreements continued to subsist. Once that happened as it did here, and the parties did not fix a fresh time for completion then, according to

Mr. Michael KT Chow, time became at large. It was because of this that it was submitted that the defendant was entitled to rely on s. 47 of the Contracts Act 1950 and this meant that the defendant was allowed a leeway to complete the development of the condominium units within a reasonable time. In short, a reasonable time will be accorded to the defendant to complete the sale and purchase agreements with the plaintiffs. Section 47 of the Contracts Act 1950 enacts as follows:

> Time for performance of promise where no application is to be made and no time is specified
>
> Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.
>
> Explanation - The question 'what is a reasonable time' is, in each particular case, a question of fact.

and the ramifications of this section can be seen in the case of *Hock Huat Iron Foundry (suing as a firm) v. Naga Tembaga Sdn Bhd* [1999] 1 MLJ 65 where NH Chan JCA writing a separate judgment for the Court of Appeal aptly said at p 77:

> Therefore, since time was no longer of the essence of the contract by the defendant's waiver of it by allowing time to pass, the contract could no longer be avoided under s. 56(1). However, since the plaintiff now had a reasonable time (s. 47) to complete the project, compensation could not be awarded for delay. This is because there could not be any delay as the plaintiff had a reasonable time to complete and in fact, was allowed to complete the project.

Flowing from all these arguments and applying them to the facts of the present case, it was vigorously submitted that as the plaintiffs had allowed time to pass beyond the original completion dates without raising a whimper, then it must follow that the plaintiffs must have affirmed the sale and purchase agreements. This meant that time was no longer of the essence and that the defendant now had a reasonable time to complete the condominium units and that no liquidated ascertained damages could be awarded for the delay. It was also submitted that by virtue of s. 56(3) of the Contracts Act 1950 that unless the plaintiffs had given the defendant the relevant notices of their intentions to accept a later performance of the sale and purchase agreements, the plaintiffs were not entitled to claim compensations for the delay. This meant that the plaintiffs must have agreed that the defendant may perform their promise at some other time, which has to be at a time later than what the plaintiffs had so agreed - that is to say when performance has not been completed yet. Abdul Aziz J (now JCA) in *Sakinas Sdn Bhd v. Siew Yik Hau & Anor* [2002] 5 MLJ 498 interpreted s. 56(3) of the Contracts Act 1950 in this way (see p 514 of the report):

> In my opinion, the words 'at any time other than that agreed' do not refer to the act of accepting performance of the promise, but refer to the performance of the promise itself. The words 'If ... the promisee accepts performance of the promise at any time other than that agreed' do not mean that performance has been delayed but is now completed and the promisee now, at a time later than the agreed time, accepts the performance. If that were so, and the promisee now gives notice of intention to claim compensation, the notice cannot be of any practical use to the promisor, except to enable him to know in advance that there will be a claim against him and he had better get ready with the money to pay his lawyers, and the promisee, if the promisee should succeed, which I do not think is the intended purpose of the notice. The phrase really means, in my opinion, the promisee accepting, meaning agreeing, that the promisor who has been in breach as to time may perform his promise at some other time, which has to be a time later than the time of the promisee's so agreeing. At the time of the promisee's so agreeing, the performance has not been completed yet. The promisee says, 'It's all right. Although the contract is now voidable because of your delay, I will not void it. You may complete it later, on such and such a date. At the time that he says so, the promisee, if he wants to claim compensation for the delay, must give notice of his intention to claim compensation, otherwise the promisor is entitled to assume that he will not be liable to any compensation. The notice is important as it will enable him to come to a commercial decision whether it is viable for him to go on performing if he is going to have to pay compensation.

It seems to me that the case of *Sakinas Sdn Bhd v. Siew Yik Hau & Anor* also lays down the principle that the notice is to be given when the promisee expressly affirms the contract. In sharp contrast would be the case of *Hindustan Construction Company v. The State of Bihar* where there was no necessity for such a requirement because unless expressly terminated, the contract was said to continue to subsist. There was no question of a positive act required on the part of the promisee to affirm the contract and to that extent *Sakinas* differed from *Hindustan Construction Company*.

Still relying on *Sakinas*, it was pointed out that in that case his Lordship Abdul Aziz J (now JCA) had held that the failure to give notice of intention to claim compensation at that time would entitle the promisor to assume that he will not be liable to pay any compensation. His Lordship was of the view that the notice was crucial as 'it will enable him (the promisor) to come to a commercial decision whether it is viable for him to go on performing if he is going to have to pay compensation.' Using this passage as a leverage, it was submitted on behalf of the defendant that s. 56(3) of the Contracts Act 1950 would operate to bar the plaintiffs from any claim for liquidated ascertained damages by reason of the plaintiffs' failure to give the requisite notices at the expiry of the original completion dates or so soon thereafter, that would be at the point of time when the right to rescission arose.

To buttress the defendant's stand that s. 56(3) of the Contracts Act 1950 would aid the defendant in warding off the claim for liquidated ascertained damages, it was argued that since the sale and purchase agreements were in accordance with Schedule 'H' to the Housing Regulations which were in turn made under the Housing Act, then that sale and purchase agreements took on a legal nature similar to that of a piece of subsidiary legislation akin to the Housing Regulations. Being a piece of subsidiary legislation, it Was argued that the sale and purchase agreements governing the parties cannot override the general application of the Contracts Act 1950. It was emphasized that the provisions of the Contracts Act 1950 being a Federal law must necessarily prevail and override the subsidiary legislation. My attention was drawn to s. 87(d) of the Interpretation Acts 1948 and 1967 which enacts as follows:

> When an [Act of Parliament,] Ordinance or Enactment confers power on any authority to make subsidiary legislation, the following provisions shall, unless the contrary intention appears, have effect with reference to the making and operation of such subsidiary legislation:
>
> (d) no subsidiary legislation made under an Act of Parliament or Ordinance shall be inconsistent with any [Act of Parliament or] Ordinance, and no subsidiary legislation made under a State ... Enactment shall be inconsistent with any Act of Parliament or Ordinance or Enactment.

And it was argued that this provision falls within Part II of the Interpretation Acts 1948 and 1967, which by virtue of s. 65 thereof, applies to the Housing Act and the Housing Regulations. All these arguments were highlighted by Mr. Michael KT Chow to show that the sale and purchase agreements which bind the parties must not override and must be read in the context of the Contracts Act 1950. Put differently, it was submitted that being a subsidiary legislation the sale and purchase agreements cannot override and must be subservient to the Contracts Act 1950. In a textbook entitled *Statutory Interpretation, A Code* (3rd Ed) by FAR Bennion at p. 174, the following passage appears:

> Must not conflict with law unless the enabling Act so provides, delegated legislation cannot override any Act - and certainly not the enabling Act itself (*Re Davis, exp Davis* (1872) 7 Ch App 526 at p 529). Indeed it is taken not to be impliedly authorized to override any rule of the general law (5 Co Rep 63a; *Hall v. Nixon* [1875] LR 10 QB 152 at p. 159; *Rossi v. Edinburgh Corpn* [1905] AC 21. See further Code s. 58).

Applying this passage, it was argued that the subsidiary legislation like the Housing Regulations was not only prohibited from expressly conflicting or overriding the application of the general law such as the Contracts Act 1950 but it was further forbidden to even impliedly override the same. It was further argued that even if cll. 22(1) and 24(1) of the sale and purchase agreements were applicable to allow compensation in the form of liquidated damages, these clauses

must be read with the provisions of the Contracts Act 1950, especially s. 56(3) thereof. In other words, it was pointed out that the plaintiffs must give the requisite notices of their intentions to claim liqidated damages at the expiry of the original completion dates.

Mr NV Sree Harry, the learned counsel for the plaintiffs, quite rightly argued that this was a case where there was a blatant breach of the sale and purchase agreements by the defendant in not completing the common facilities and in not delivering vacant possession of the condominium units to the plaintiffs within the 36 months and that this state of affairs was still continuing. Mr NV Sree Harry also pointed out that although it was open to the defendant as the developer under the Housing Regulations to try and persuade the Controller of Housing to vary the date of delivery of vacant possession or even to vary the date of completion of the common facilities, yet the defendant as the developer made no attempts to do so. He further submitted that the purchasers' claims - referring to the plaintiffs, were essentially for liquidated damages based on the standard sale and purchase agreements as found in Schedule 'H' of the Housing Regulations.

To me, the legal stand adopted by the defendant was this. That the plaintiffs as the purchasers cannot claim compensations for late delivery because at the expiry of the original completion dates, the plaintiffs did not give to the defendant the requisite notices of their intentions to claim compensations pursuant to s. 56(3) of the Contracts Act 1950. But the plaintiffs through Mr. NY Sree Harry submitted that s. 56(3) of the Contracts Act 1950 did not apply to the plaintiffs because as purchasers, the plaintiffs did not indicate to the defendant when the contracts became voidable on the original completion dates, or so soon thereafter, that it was acceptable to the plaintiffs if the defendant fulfilled their promise at some other time. For his interpretation of s. 56(3) of the Contracts Act 1950, Mr. NV Sree Harry relied on the case of *Sakinas* in particular to the passages that were reproduced earlier as seen at p. 514 of the MLJ reporting and he too relied on the following passage at the same page in the judgment of Abdul Aziz J (now JCA) in *Sakinas*:

> In my opinion, sub-s (3) does not apply to the respondents unless when the contract became voidable on 13 December 1997, or soon after that, they indicated to the appellants that it was acceptable to them if the appellants fulfilled their promise at some other time. There is no evidence as to that.

Flowing from that it was strenuously argued by Mr NV Sree Harry that just like the *Sakinas*' case, the present case too would bring it outside the scope of s. 56(3) of the Contracts Act 1950 because the plaintiffs did not indicate to the defendant when the contracts became voidable on the original completion dates, or so soon thereafter, that it was acceptable to the plaintiffs if the defendant fulfilled their promise at some other time. There was no evidence here that the plaintiffs did that.

It is pertinent to note that the facts in *Sakinas* are on all fours with the facts of the present case. In that case, the purchaser brought an action against the developer for liquidated damages when the developer failed to hand over vacant possession of the apartment and to complete the common facilities in time and the developer, just like the present case, attempted to defeat the purchaser's claim for liquidated damages by contending that since the purchaser did not give the developer notice of their intention to claim compensation for late delivery pursuant to s. 56(3) of the Contracts Act 1950, the purchaser was not entitled to receive the compensation.

It must be borne in mind that the Housing Act is a specific piece of social legislation to protect house buyers or purchasers from unscrupulous developers. This was the thinking of the then Federal Court (Suffian LP, Syed Othman and Abdul Hamid FJJ) in the case of *SEA Housing Corporation Sdn Bhd v. Lee Poh Chee* [1982] 2 MLJ 31, where Suffian LP speaking for the then Federal Court aptly said at p. 34 of the report:

> It is common knowledge that in recent years, especially when government started giving housing loans making it possible for public servants to borrow money at 4% interest per annum to buy homes, there was an upsurge in demand for housing, and that to protect home buyers, most of whom are people of modest means, from rich and powerful developers, Parliament found it necessary to regulate the sale of houses and protect buyers by enacting the Act.

...

And at p. 814 Lordship continued:

...

It would be correct to say, and I so say that the Contracts Act 1950 is a piece of legislation of a general nature setting out the general law governing contracts between the parties, in general. Whereas, the Housing Act was enacted to 'provide for the control and licensing of the business of housing development in West Malaysia and for matters connected therewith'. In short, it is a piece of specific legislation governing the sale of houses by a licensed developer. The plaintiffs' claims for liquidated ascertained damages were not based on the general contract but rather on the standard sale and purchase agreements as set out in accordance with Schedule 'H' to the Housing Regulations which were made under the Housing Act. Seen in its correct perspective, the present case was a tussle between the specific law and the general law. On the need to accord precedence to a specific provision, I had occasion to say in *Folin & Brothers Sdn Bhd v. Wong Foh Ling & Wong Swee Lin & Ors* [2001] 2 MLJ 23, especially at pp 41-42 of the report, the following:

> In my judgment, the specific provision must necessarily take precedent over the general provision ... .

And at p. 816 his Lordship said:

...

Likewise here, the sale and purchase agreements made in accordance with Schedule 'H' to the Housing Regulations which were in turn made under the Housing Act must take precedence over the Contracts Act 1950. Being a specific piece of social legislation enacted solely to protect house buyers from unscrupulous developers, the standard sale and purchase agreements signed by the plaintiffs must take precedence over the Contracts Act 1950 and must be given effect accordingly.

...

At pp. 818 and 819 his Lordship said:

...

Put differently, in construing the standard sale and purchase agreements which the plaintiffs have signed with the defendant, one must examine the language employed therein and at the same time bearing in mind the purpose of the Housing Act one must not purport to go around the Housing Act and the Housing Regulations so as to remove the protection accorded to the plaintiffs as house buyers by importing s. 56(3) of the Contracts Act 1950. It would certainly be erroneous in the extreme to burden the plaintiffs as purchasers with the requirement of s. 56(3) of the Contracts Act 1950 when the Housing Act and the Housing Regulations do not impose such a burden. In my judgment, any attempt to impose such a burden will taint and remove the very protection which the Housing Act under which the Housing Regulations were made was enacted for. This certainly cannot be the law of the country. Incidentally, if Parliament intended that the plaintiffs as purchasers must notify the defendant as developer of the plaintiffs' intention to claim liquidated ascertained damages before making such a claim, then Parliament would have manifested that intention in the standard sale and purchase agreements which the plaintiffs have signed. The fact that there was no such requirement incorporated in the standard sale ,and purchase agreements showed, on the balance of probabilities, that Parliament had never intended to impose such a burden on the plaintiffs as the purchasers of those condominium units. This conclusion is fortified by the words which Parliament employed in cll. 22(2) and 24(2) of the standard sale and purchase agreements which read, *inter alia*, that 'the vendor shall pay immediately to the purchaser liquidated damages.' To read and apply s. 56(3) of the Contracts Act 1950 into a claim for liquidated ascertained damages that was guaranteed under the Housing Act wherein the Housing Regulations were made would only lead to absurdity because it would remove the very protection that Parliament had guaranteed to the plaintiffs as purchasers of the condominium units ... .

At pp. 821 to 822 his Lordship said:

> If I am wrong in my approach, I have this to say. Section 56(3) of the Contracts Act 1950 would only apply if and only if the plaintiffs as the purchasers have indicated to the defendant as the developer when the contracts became voidable and that would be on the original completion dates or soon thereafter. Here, there was no evidence whatsoever of any indication by the plaintiffs and for that reason s. 56(3) of the Contracts Act 1950 do not apply. No layman who purchases a property from a developer and who signs the standard sale and purchase agreement just like the present plaintiffs here did would be bothered to cross-check with the Contracts Act 1950 in order to ascertain his legal right to claim for liquidated ascertained damages. In the present case, cll. 22(2) and 24(2) of the sale and purchase agreements certainly give the present plaintiffs as the purchasers of the condominium units the right to sue for liquidated ascertained damages without the need to rescind the sale and purchase agreements. The language employed in cll. 22(2) and 24(2) of the sale and purchase agreements were rather explicit and they are worded in this way:
>
> Clause 22(2): If the vendor fails to hand over vacant possession of the said parcel, to which water and electricity supply are ready for connection to the said parcel, in time, the vendor shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of 10% pa of the purchase price.
>
> Clause 24(2): If the vendor fails to complete the common facilities in time the vendor shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of 10% pa of the last 20% of the purchase price.
>
> No one can deny that these words are clear and unambiguous and when couched in these terms the plaintiffs as the purchasers of the condominium units have an immediate right to claim for liquidated damages without the need to rescind the sale and purchase agreements. Business efficacy must be given to these words. Commercial effectiveness must be accorded to these sale and purchase agreements. I am asked to imply as a term of the contract that s. 56(3) of the Contracts Act 1950 be read into the sale and purchase agreements entered between the plaintiffs and the defendant. I am to say, however, that it is not sufficient to justify an implication simply because it is reasonable to do so ... .
>
> I am also to say that it is essential that any term that is sought to be implied must operate reasonably and equitably between the parties. Here obviously for the reasons alluded to by me, to imply s. 56(3) of the Contracts Act 1950 into the sale and purchase agreements in order to shackle the plaintiffs and benefit the defendant cannot be said to be reasonable and equitable between the parties. In my judgment, an unreasonable or inequitable term will and shall not be implied by this court.
>
> ...

> All said and done, it was part and parcel of my judgment that the sale and purchase agreements between the parties were commercially effective without the need to imply s. 56(3) of the Contracts Act 1950 into it

And at p. 824 his Lordship said:

> It was argued on behalf of the defendant that the standard sale and purchase agreements as seen in Schedule 'H' of the Housing Regulations were nothing more than mere contractual documents and that being the case it was further argued that the normal rules of construction would apply in construing such contractual documents. Now, taking these arguments in its correct perspective and to its logical conclusion, it must be emphasized that the word 'immediately' that appears in both cll. 22(2) and 24(2) of the sale and purchase agreements which have been reproduced earlier would mean that the purchasers have the right to claim the liquidated ascertained damages without giving the requisite notices to the defendant under s. 56(3) of the Contracts Act 1950. Being contractual documents, there can be little or no argument at all that the defendant as the developer had agreed to waive their right in respect of the notification requirement under s. 56(3) of the Contracts Act 1950. This was my judgment and I so hold accordingly,

His Lordship has given an admirable and very reasoned judgment in *Hariram*'s case which I am in full agreement. And I hereby adopt and apply the aforesaid to our case. I therefore reject all the contentions raised by the defendant.

The defendant has raised the issue that because of the economic downturn of this country that delayed the completion of the project by almost three years has frustrated the adventure embodied in the respective sale and purchase agreements.

In other words the defendant is relying on the doctrine of frustration under s. 57(2) of the Contracts Act 1950 to challenge the plaintiffs' claims.

Section 57(2) of the Contracts Act 1950 reads as follows:

> Contract to do act afterwards becoming impossible or unlawful.
>
> (2) A contract to do an act which, after the contract is made becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Regulation 11 of the Housing Regulations reads as follows:

> Contract of sale
>
> (1) Every contract of sale for the sale and purchase of a housing accommodation together with the subdivisional portion of land appurtenant thereto shall be in the form prescribed in Schedule G and where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building, it shall be in the form prescribed in Schedule H.
>
> (2) No housing developer shall collect any payment by whatever name called except as prescribed by the contract of sale.
>
> (3) Where the Controller is satisfied that owing to special circumstances or hardship or necessity compliance with any of the provisions in the contract of sale is impracticable or unnecessary, he may, by a certificate in writing, waive or modify such provisions:
>
> Provided that no such waiver or modification shall be approved if such application is made after the expiry of the time stipulated for the handing over of vacant possession under the contract of sale or after the validity of any extension of time, if any, granted by the Controller.

The word "Controller" is defined under s. 3 of the Housing Act to mean "the Controller of Housing appointed under s. 4".

Under Regulation 11(3) of the Housing Regulations the defendant may be able to escape liability for liquidated damages for late delivery provided that the defendant make the application before the expiry of the time stipulated for the handling over of vacant possession under the contract of sale or after the validity of any extension of time, if any, granted by the Controller of Housing.

In *Hariram*'s case the defendant did not apply to the Controller of Housing under reg. 11(3) of the Housing Regulations for extention of time to deliver vacant possession. However in our case the defendant had applied to the Controller of Housing for a certificate to extend the time for the delivery and completion of the condominium units but the Controller of Housing has rejected the defendant's application and refused to grant the certificate extending time.

In my view it would not be prudent for this court to accept the defence of frustration under s. 57(2) of the Contracts Act 1950 and allow the defendant to escape liability for the delay in delivering vacant possession of the condominium units as the Controller of Housing has rejected the defendant's application for an extension of time to deliver vacant possession. "To do so would be tantamount to creating another avenue for the defendant to escape

liability for late delivery of vacant possession of the condominium units which Parliament had never intended nor provided for in the Housing Act or the Housing Regulations." Further to allow the defence of frustration to succeed would amount to this court to override the decision of the Controller of Housing in refusing to grant the certificate for extention of time to deliver vacant possession of the condominium units given under reg. 11(3) of the Housing Regulations.

As such I reject the defence of frustration.

In view of the aforesaid I granted orders in terms of encl. 1.

Exhibit "A2" (at pp. 31 to 33 of encl. 2) is the notice dated 30 September 2002 sent by the defendant to the 18th plaintiff stating that "the above property purchased by you has been duly completed and the vacant possession of the said property can now be delivered to you."

In the same notice it is also stated that "Further, you shall be deemed to have taken possession of the same, upon the expiry of fourteen days from date hereof ... ."

However I ordered that liquidated damages to be calculated up to 14 days after the date stated in the notice (exh. "A2") dated 30 September 2002 for the plaintiffs to take delivery of vacant possession. I also ordered that costs to be taxed.